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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

ELVIS RUIZ, et al., Plaintiffs, v. MAX FERNANDEZ, et al., Defendants.	No. 2:11-cv-3088-RMP PLAINTIFFS' MEMORANDUM IN RESPONSE TO FERNANDEZ DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' STATE LAW CLAIMS SHOULD BE DENIED.

Defendants Max and Ann Fernandez have moved this Court for summary judgment with respect to the plaintiffs' state law claims for violation of Washington wage statutes, breach of contract, and quantum meruit. Defendants' motion as to these claims relies exclusively on the narrative report of an unidentified investigator with the United States Department of Labor ("DOL") who

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investigated plaintiffs' complaints against defendants after they left Fernandez Ranch (the "DOL report"). Defendants have previously offered the same evidence in their unsuccessful effort to have this case dismissed. *See* Order Denying Defendants' Motion to Dismiss, ECF No. 62 at 10 n.2. Defendants now assert that the DOL investigation produced findings that should be deemed established for the purposes of this litigation under the doctrine of collateral estoppel. In the alternative, they ask the Court to give deference to the DOL investigator's narrative as an "interpretation" by the agency of its own regulations. Memorandum in Support of Fernandez Defendants' Motion for Summary Judgment ("Fernandez Summary Judgment Memo"), ECF No. 139 at 14-16. Just as defendants' previous argument based on the DOL investigation failed, the Court should find the latest incarnations similarly without merit. As demonstrated below, the investigator's narrative report is inadmissible and not entitled to preclusive effect or deference.

A. The DOL Report and its Contents Are Inadmissible Hearsay.

In opposing a motion for summary judgment, a party may object that the supporting materials relied on by the movant "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). Under the Federal Rules of Evidence, an out-of-court statement is inadmissible hearsay when offered to prove the truth of the matter asserted. Fed. R. Evid. 801-802. In a civil case, an exception may be available for certain "public records" setting out "factual

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findings from a legally authorized investigation," but only so long as "neither the source of information nor other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8). Because the DOL report is generally untrustworthy, the court should disregard it entirely. In addition, the report is based on independently inadmissible hearsay statements of third parties, to which no exception applies.

1. The Investigator's Report is Not Trustworthy.

In considering admissibility under Rule 803(8), "a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof …that she determines to be untrustworthy." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988). The Rule 803(8) advisory committee's note proposed a nonexclusive list of four "trustworthiness" factors to evaluate public records: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias. In *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770 (9th Cir. 2010), the Ninth Circuit considered these factors and upheld exclusion of a DOL investigator's report as untrustworthy in the context of a summary judgment motion and in circumstances similar to those encountered in this case. In *Sullivan*, the DOL investigator's report was proffered in connection with alleged violations of the Family and Medical Leave Act. The *Sullivan* court noted the following indicia of untrustworthiness in upholding exclusion:

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> The report is incomplete because its exhibits are not attached. Its author is unidentified and unknown, making it impossible to assess the author's skill or experience. No hearing was held. The document does not appear even to be a final report, as distinct from an internal draft….The DOL did not issue the report or send it to either party at any time before this litigation; rather it became available only because [a party] filed a [Freedom of Information Act] request….

623 F.3d at 778.

The DOL's report in this case bears the same indicia. The report is incomplete because it refers to numerous "exhibits" that do not accompany it. *See* DOL Narrative, ECF No. 49-3 at 13, 15, 17, 19-21, 24. Its author is not identified, and there was no hearing. It does not set out final actions to be taken, but rather, makes "recommendations" as to penalties (*id.* at 5). And that "the file remain open…" (*id*. At 9). And the report was not made available outside of a request under the Freedom of Information Act. Fernandez Defendants' Memorandum in Support of Motion to Supplement the Record, ECF No. 50 at 1-2.

Further examination of the report confirms that the investigation was conducted in such a way as to make any of its supposed findings untrustworthy. The report indicates that an investigator spoke with two plaintiffs about wage issues, interviewed Max Fernandez and certain unnamed employees then working at Fernandez Ranch, and then simply credited Mr. Fernandez' statements at face value. The investigator never told the plaintiffs about what Mr. Fernandez or the unidentified sources had said or gave the plaintiffs any chance to rebut these

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assertions. Plaintiffs' Counter Statement of Facts ("CSOF") at ¶25-28. For these reasons alone, the DOL report is untrustworthy, and thus inadmissible hearsay.

The investigator's narrative of supposed findings is likewise so permeated with error as to make the report untrustworthy. In one of the more egregious examples, the investigator credits Mr. Fernandez' assertion that "the H-2A workers are kept busy either on the range or at the ranch doing specifically work with the sheep." DOL Narrative, ECF No. 49-3 at 18. Veracity aside, this statement misstates the standard for the FLSA exemption for range sheepherding, which requires that the worker spend the majority of his time engaged in the production of livestock "on the range." 29 C.F.R. § 780.324 (a); *Id.* at 780.326(a). The exemption is "not intended to apply to feed lots or to any area where the stock involved would be near [ranch] headquarters." 29 C.F.R. § 780.329(c).[1]

For these reasons, the Court should deem the DOL report untrustworthy and exclude it entirely from consideration for purposes of the instant motion.

2. Regardless of Admissibility Under the Public Records Exception, Proffered Contents of the Report are Inadmissible Hearsay.

[1] The DOL investigator also made serious errors in discussing the joint employment relationship between WRA and Fernandez Ranch. For example, the investigator commented that "once [H-2A workers] are assigned to a rancher, the rancher is responsible for hiring and firing the workers." DOL Narrative, ECF No. 49-3 at 14. To the contrary, WRA makes all hiring decisions, and only WRA has the power to terminate workers. *See* Plaintiffs'Memorandum in Support of Motion for Partial Summary Judgment, ECF No. 141 at 10-11.

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Not only is the DOL report generally untrustworthy, but the specific statements relied on by defendants are independently inadmissible under the Federal Rules of Evidence. Even if the DOL report qualifies as a "public record" for purposes of Rule 803(8), this does not end the hearsay inquiry.

> Rule 803(8) deems a public report admissible based on the notion that its official author knows what he is talking about and will state the facts accurately. *That presumption does not attach to the statements of third parties who themselves bear no public duty to report what they observe. Thus, the statements in the report would be hearsay even if the author of the report were present in court. United States v. Chu Kong Yin*, 935 F.2d 990, 999 (9th Cir. 1991) ("the public documents exception to the hearsay rule is only the substitute for the appearance of the public official who made the record").

San Francisco Baykeeper v. W. Bay Sanitary Dist., 791 F. Supp. 2d 719, 744 (N.D. Cal. 2011) (emphasis added). *See also United States v. Mackey*, 117 F.3d 24, 28-29 (1st Cir. 1997) ("decisions in this and other circuits squarely hold that hearsay statements by third persons…are not admissible under [Rule 803(8)] merely because they appear within public records…. This is the same 'hearsay within hearsay' problem that is familiar in many contexts.").

Defendants assert that "the DOL found there was 'no violation' for the allegation of failing to pay the proper rate." Fernandez Summary Judgment Memo, ECF No. 139 at 10. However, the purported facts underlying the investigator's conclusion are based solely on the statements of third parties, rather than the investigator's firsthand observations:

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> [Fernandez and I] discussed the work other than the work described in the job description assigned to the "Sheep Herder" responsibilities. *Fernandez stated* that the H-2A workers are kept busy either on the range or at the ranch doing specifically work with the sheep. *He stated* that both he and his other non-H-2A workers do all the tractor work, harvesting, and feeding of the cattle and by the time the herders get back to the ranch all the harvest work is finished and the tractors are not used during the winter…*The interviews of the current workers indicate* that they do not do any work not related to the sheep.

DOL Narrative, ECF No. 49-3 at 7-8 (emphasis added). Mr. Fernandez cannot shield these out-of-court statements made by him or by unnamed workers from cross-examination. This is precisely what the rule against hearsay is designed to forbid. *See Freitag v. Ayers*, 463 F.3d 838, 850 n.5 (9th Cir. 2006) (admitting a report under Rule 803(8) where the opposing party had a fair opportunity to challenge its reliability through cross-examination). Accordingly, any third party statements are inadmissible.

3. The DOL Investigator's Legal Conclusions are Inadmissible

Defendants urge this Court to adopt the DOL investigator's conclusion that defendant Fernandez did not violate the law by failing to "pay the proper rate." DOL Narrative, ECF No. 49-3 at16. This conclusion is premised on the investigator's determination that the workers did not perform work outside of range sheepherding that would have required them to have been paid at higher wage rates. As noted previously, this conclusion was faulty because the investigator considered as "range sheepherding" not only work with sheep that

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actually took place on the range, but also when the workers worked with the sheep at the ranch. Not only is this incorrect, it amounts to a legal conclusion that is inadmissible even if the report might otherwise qualify under the Rule 803(8) hearsay exception. Under Rule 803(8), admissibility of a public agency's investigative report extends only to findings of fact, not legal conclusions. *Sullivan*, 623 F.3d at 777. In the context of a summary judgment motion, such conclusions cannot by themselves establish the presence or, by implication, the absence of a genuine issue of material fact. *See id.*

B. Plaintiffs' Claims are Not Precluded.

Even if the Court deems some or all of the DOL report admissible, its findings are not entitled to preclusive effect in this litigation. The doctrine of collateral estoppel invoked by defendants, also known as "issue preclusion," bars only the "relitigation of issues *already actually litigated by the parties and decided by a competent tribunal*." *Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 449 (1998) (emphasis added). State law is generally controlling when preclusion is asserted as to claims under state law. *See Murray v. Alaska Airlines, Inc.*, 522 F.3d 920, 922 (9th Cir. 2008). Under Washington law, administrative agency determinations can have preclusive effect only if "the party against whom the doctrine is asserted…had a *full and fair opportunity to litigate the issue* in the earlier proceeding." *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d

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299, 307 (2004) (emphasis added). In such case, the agency must have been "acting in a judicial capacity" in reaching its findings; if not, there will be no preclusive effect. *See Reninger*, 134 Wn.2d at 449, quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). Accordingly, when deciding whether to apply the doctrine to agency findings, courts place great weight on "the differences between procedures in the administrative proceeding and court procedures." *Christensen*, 152 Wn.2d at 308. Because the DOL's investigation bore none of the "essential elements of adjudication," its factual findings should be given no preclusive effect in the instant litigation. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 509 (1987) (quoting Rest. 2d of Judgments § 83(2)).

In each of the cases cited by defendants, the court gave preclusive effect to agency findings only after a formal adversarial hearing in which "[v]ery little of significance distinguished the administrative proceedings…from a formal jury trial." *Reninger*, 134 Wn.2d at 451. For example, the parties were represented at formal administrative hearings by counsel who gave opening statements and closing arguments; examined and cross-examined witnesses; obtained documents and offered exhibits via a discovery process; made evidentiary objections; conducted depositions under oath; and submitted posthearing briefs evaluating the evidence. *See Reninger*, 134 Wn.2d at 451; *Christensen*, 152 Wn.2d at 303-04; *Shoemaker*, 109 Wn.2d at 509-510; *State v. Dupard*, 93 Wn.2d 268, 275 (1980).

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The DOL's investigation in this case offered the plaintiffs none of these essential elements of adjudication. Indeed, there was no "prior proceeding" for collateral estoppel purposes because the DOL never held a hearing, formal or informal, as part of its investigation. Apart from having been interviewed, the plaintiffs had no opportunity to participate in the investigation. And as the Court has recognized, the plaintiffs were never given notice of any opposing party's factual assertions, much less the chance to rebut them before a neutral adjudicator. *See* Order Denying Defendants' Motion to Dismiss, ECF No. 62 at 10 ("Without notification of any findings from the administrative investigation, a complainant could not pursue his or her complaints further.").

Accordingly, no supposed finding of the DOL report merits any preclusive effect in this lawsuit.

C. The Investigator's Report Warrants No Deference as a DOL "Interpretation" of its Own Regulations

Defendants argue that the Court should apply the deference that courts afford to official DOL interpretations of its regulations to the investigator's report in this case. *See Auer v. Robbins*, 519 U.S. 452 (1997). This argument is without merit. Such deference is due only when the Secretary uses her rulemaking authority or issues other interpretive guidance such as Opinion Letters in order to clarify ambiguous agency regulations. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 392 (9th Cir. 2011) (rulemaking); *In re Farmers Ins. Exch.*, 481 F.3d

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1119, 1129 (9th Cir. 2007) (Opinion Letters). When the DOL conducts an investigation into allegations of an employer's labor violations, the agency clearly is not engaged in rulemaking or issuing interpretive guidance of regulations. The cursory and untrustworthy narrative report by the DOL investigator in this case warrants no judicial deference, and defendants have failed to meet their burden of showing that they are entitled to judgment as a matter of law.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' TRAFFICKING CLAIMS SHOULD BE DENIED.

Defendants' argument that plaintiffs' claims under the Trafficking Victims Protection Reauthorization Act ("TVPRA") are insufficient mischaracterizes both the underlying facts and the requirements of the statute.[2] Plaintiffs allege a pattern of intimidation and threats that meets the statute's requirements: abuse and threatened abuse of the legal process, confiscation of passports and other immigration documents, and defendant's financial benefit as a result of obtaining plaintiffs' services by these means. Because the evidence, viewed in the light most favorable to the plaintiffs, is more than sufficient to support their TVPRA claims, defendants are not entitled to summary judgment on this issue.

A. Defendants Knowingly Obtained Plaintiffs' Services By Means Of Abuse and Threatened Abuse of Legal Process.

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[2] Plaintiffs contest many of the facts proffered by defendants in support of their motion for summary judgment. *See* Contested Facts set forth in Part I of Plaintiffs' CSOF.

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The TVPRA recognizes that labor trafficking can occur in circumstances where the victims, although not violently or physically restrained, are subjected to "more subtle psychological methods of coercion." *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004), *judgment vacated on other grounds*, 545 U.S. 1101 (2005). Specifically, the TVPRA prohibits knowingly obtaining the labor or services of a person by means of the abuse or threatened abuse of law or legal process. 18 U.S.C. § 1589(a)(3). As stated in the TVPRA:

> "Abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

18 U.S.C. § 1589(c)(1).

As Congress has recognized, trafficking can occur in the context of a wide range of legal abuses, "including [violations of] labor and immigration codes[.]" *Nunag-Tañedo v. East Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1145 (C.D. Cal. 2011), quoting H.R. Conf. Rep. 106-939, at 3, 4 (2000). Many courts have held that threats of deportation can constitute a condition of servitude induced through abuse of the legal process, violating the TVPRA. *See, e.g., Espejo Camayo v. John Peroulis & Sons Sheep, Inc.*, 2012 WL 4359086,*4 (D. Colo. Sept. 24, 2012); *Velasquez Catalan v. Vermillion Ranch Ltd. P'ship*, 2007 WL 38135, *8 (D. Colo. Jan. 4, 2007); *Ramos-Madrigal v. Mendiola Forestry Serv.*

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LLC, 799 F. Supp. 2d 958, 960 (W.D. Ark. 2011); *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 115 (D.D.C. 2012); *Nunag-Tañedo*, 790 F. Supp. 2d at 1146. Such threats constitute a misuse of the legal process when used to instill fear and promote compliance. *See Velasquez Catalan*, 2007 WL 38135 at *8. These threats gain added weight under the statute when accompanied by other indicia of trafficking, such as a defendant's retention of a plaintiff's immigration documents. *See Espejo Camayo*, 2012 WL 4359086 at *5.

Defendants quote at great length the case of *Alvarado v. Universidad Carlos Albizu*, 2010 WL 3385345 (S.D. Fla. Aug. 25, 2010). *See* Fernandez Summary Judgment Memo, ECF No. 139 at 20-21. However,

> *Alvarado*'s facts are not similar to those here. *Alvarado* did not involve "threats" of deportation…; rather, the employer merely threatened to withdraw support for (and retention of an attorney to assist) the employee's application to extend the employee's labor certification. Thus, a case like *Alvarado* is not particularly persuasive in the circumstances presented here.

Espejo Camayo, 2012 WL 4359086 at *4. Indeed, the facts of this case share much in common with those of *Espejo Camayo*, where H-2A sheepherders brought a claim under the TVPRA's "abuse of the legal process" prong after the defendants threatened them with deportation, "apparently simply to instill fear and promote compliance." *Id.* at *5. The defendant bragged about having workers arrested who had left the ranch, and retained important immigration documents. *Id.* The court

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found that these facts were sufficient to support the TVPRA claims. *Id.* Given the similarity of the facts to the case at bar, this Court should do the same.

Here, the evidence shows multiple instances of conduct by Mr. Fernandez that constitute misuse of the legal process. When plaintiffs Castro and Ruiz arrived at Fernandez Ranch, Mr. Fernandez took away and held their immigration documents, despite requests for their return. CSOF ¶1. Mr. Castro retrieved his documents only upon his transfer from the ranch in October 2008. CSOF ¶2. Mr. Fernandez returned Mr. Ruiz' passport only after multiple requests almost two years later. CSOF ¶2. All of the plaintiffs testified that Mr. Fernandez would threaten them almost on a daily basis, saying that they would be sent back to Chile if they did not do as he said. CSOF ¶3. Mr. Fernandez instructed plaintiffs not to talk with neighbors and repeatedly warned plaintiffs that, if they left the ranch without permission, he would call immigration or the police and they would be deported. CSOF ¶¶4-5. After Mr. Castro fled the ranch, Mr. Fernandez told plaintiff Martinez that the FBI was hunting for Castro. CSOF ¶7.

The many ways that Mr. Fernandez acted to exert control over the plaintiffs support plaintiffs' claim that his constant threats of deportation were threats intended to keep the plaintiffs on his ranch, rather than innocent recitations of the H-2A program requirements. For example, when Mr. Fernandez found out that a woman was visiting plaintiff Castro as he herded sheep by the Centerville

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Highway, he first prohibited Mr. Castro from seeing her. CSOF ¶14. When Mr. Castro objected, Mr. Fernandez warned that, if this woman ever came onto the ranch, Mr. Fernandez would call the police.[3] *Id.* Mr. Fernandez regularly watched the sheepherders through binoculars. CSOF ¶15. Plaintiffs felt that the threats were intended to intimidate them. CSOF ¶9. Mr. Martinez continued to have nightmares after he left the ranch as a result of Mr. Fernandez' threats. CSOF ¶9.

Even after plaintiffs left the ranch, Mr. Fernandez tried to misuse the legal process to intimidate them into refraining from exercising their rights. In April 2010, several days after plaintiffs sent Mr. Fernandez a letter demanding unpaid wages, Mr. Fernandez filed a criminal complaint against plaintiff Ruiz, falsely accusing him of pocketing $100 given to him by a neighbor five months earlier for the purchase of hay from the ranch. CSOF ¶17. Then, in 2011, after the DOL found that Mr. Fernandez owed plaintiffs Castro and Ruiz unpaid wages, both plaintiffs received anonymous letters threatening that immigration authorities would be waiting for them if they went to the DOL office to pick up their checks. CSOF ¶18. Since no one else knew about the checks, plaintiffs believe that Fernandez sent these letters. CSOF ¶19. All three plaintiffs fled the ranch at night

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[3] Mr. Fernandez' conduct in this instance is particularly egregious because, under Washington law, migrant agricultural workers are permitted to have guests visit them at their employer-provided housing even over the farm owner's objection. *See State v. Fox*, 82 Wn.2d 289, 292-93 (1973).

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when they left because they believed that, if Mr. Fernandez knew that they were leaving, he would call the police to stop them. CSOF ¶20.

Contrary to Mr. Fernandez' allegation, the evidence does not show that plaintiffs were free to transfer to a different ranch upon their own request. . CSOF ¶22. Mr. Martinez' transfers had been at the request of the ranchers he worked with. CSOF ¶23. Mr. Castro did not know whether or not Western Range would authorize a transfer without Mr. Fernandez' approval and therefore asked Mr. Fernandez for permission for a temporary transfer to a different ranch. CSOF ¶24. When it was time for the lambing to begin in March 2009, WRA arranged for Mr. Castro's transportation back to Mr. Fernandez without asking Mr. Castro whether or not he wished to return. *Id.* Mr. Ruiz testified that he did not know that he had a right to request a transfer. CSOF ¶23. Finally, nowhere does the employment agreement signed by plaintiffs state that plaintiffs could request a transfer, let alone that they had a "right" to transfer to another ranch. To the contrary, section twelve of the agreement states that "[WRA] and the employer may transfer the employee to another employer… If an Employee objects to a transfer, the [WRA] will consider the worker's concerns; however refusal on the part of the worker to transfer may subject the worker to dismissal..." *See* Ex. 15 to Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment (hereafter "SOF"),

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ECF No. 146. Clearly, all of the power here lies with WRA and the rancher, not with the workers.

Given the factual context of Mr. Fernandez' statements that the plaintiffs would be reported to immigration authorities if they left his ranch, the plaintiffs have alleged sufficient facts to support their claim that Fernandez' threats constitute a "abuse of legal process" under the TVPRA since the objective was to intimidate and coerce the plaintiffs into remaining on the ranch.

B. Defendant Fernandez Knowingly Concealed, Removed and Confiscated Plaintiffs' Immigration Documents.

The TVPRA specifically makes it unlawful for anyone to "confiscate[], or possess[] any actual or purported passport or other immigration document …" in the course of a violation of section 18 U.S.C. § 1589. 18 U.S.C. § 1592. Thus, such action provides a basis for the TVPRA's civil cause of action under 18 U.S.C. §1595. Here, plaintiff Ruiz' allegation that Mr. Fernandez held his passport for two years despite Mr. Ruiz' requests to have it returned to him (CSOF ¶1) and Plaintiff Castro's allegation that Fernandez took his passport upon his arrival and held it against his wishes until he was transferred to Utah seven months later (CSOF ¶2) are sufficient to raise an issue of material fact that Fernandez violated the TVPRA, especially given the pattern of intimidation engaged in by Fernandez.

C. Mr. Fernandez' Conduct Caused Plaintiffs to Believe that they Would Suffer Serious Harm

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Plaintiffs' testimony of regular verbal abuse and threats, restrictions on the use of telephones and leaving the ranch, denial of sufficient access to food and other necessities, the requirement that plaintiffs work seven days per week without any days of rest, and the very visible close ties that Mr. Fernandez had with local law enforcement, all support plaintiffs' claim that Fernandez intended plaintiffs to believe that they would suffer serious harm if they did not do the work that he assigned them. *See* 18 U.S.C. § 1589(a)(4); CSOF ¶¶3-15, 21, 25-26.

Defendants argue that plaintiffs' admission that they "were provided food" defeats their claim of mistreatment. Given the amount and quality of the food at issue, this argument is baseless. Plaintiff Castro testified that the food he was provided while living in a trailer off the ranch was little more than flour, coffee and salt. His diet for the five-month period consisted mostly of his homemade bread, sheep meat, and coffee, plus one can of tuna and one package of spaghetti provided by Mr. Fernandez. CSOF ¶¶11-13. All three plaintiffs testified that they were hungry while working at the Fernandez Ranch, a serious matter for grown men performing physical labor seven days per week. CSOF ¶10.

In light of the foregoing, plaintiffs have raised sufficient issues of material fact so as to preclude dismissal of their trafficking claims by summary judgment.

III. THE MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' QUANTUM MERUIT CLAIMS SHOULD BE DENIED.

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Plaintiffs have pled a claim for quantum meruit as an alternative remedy to their contract claim. The principles of quantum meruit allow the Court to award plaintiffs the reasonable value of their work when a change in circumstances requires extra work that was not contemplated in the original contract. *See Young v. Young*, 164 Wn.2d 477, 485 n.4 (2008). The elements of quantum meruit are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work. *Id.* at 486. Contrary to Fernandez' argument, recovery can be awarded under quantum meruit even where the parties have entered into an express contract. *D'Amato v. Lillie*, 401 F. App'x 291, 293-94 (9th Cir. 2008).

In *D'Amato*, the parties entered into a contract whereby a worker would manage a salon. Over time, the business expanded and the worker began managing multiple salons. The court agreed that this change in the worker's duties justified the worker's retention of additional salary under the theory of quantum meruit. The court reasoned that if a jury found that "[the employer] either knew or reasonably should have known of the services performed and benefit conferred," the second and third elements of quantum meruit would be met, and that the first requirement was met where "substantial changes occurred *requiring* [the worker] to perform work outside the scope of the contract[]." *D'Amato v. Lillie*, 2008 U.S. Dist. LEXIS 117252, *12 (E.D. Wash. Oct. 23, 2008) (emphasis added). By

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contrast, the plaintiff workers in *MacDonald v. Hayner*, 43 Wn. App. 81 (1986), cited by defendants, failed to prevail on quantum meruit because the workers decided *on their own initiative* to expand the scope of the work initially contracted for and then demand additional compensation. *MacDonald*, 43 Wn. App. at 85.

Here, as in *D'Amato*, plaintiffs had no control over the work being demanded of them. Max Fernandez at all times supervised and directed the work of plaintiffs. CSOF ¶21; s*ee also* SOF ¶¶91, 94. Plaintiffs came to Fernandez Ranch prepared to work as range sheepherders. However, Mr. Fernandez needed only one sheepherder at any one time to herd his sheep off the ranch property. SOF ¶107. Mr. Fernandez requested additional sheepherders and then assigned them to perform duties well outside the scope of range sheepherding. SOF ¶¶84-91, 92-93, 95-100. Mr. Fernandez benefitted from this arrangement, as he obtained the work of plaintiffs for an unlimited number of hours, seven days per week, for a total of $750 per month. Given Fernandez's knowledge of the H-2A sheepherder job description, he either knew or should have known that plaintiffs should receive additional payment for their additional services and that he was receiving those services essentially free of charge. Accordingly, plaintiffs have alleged sufficient facts so as to preclude summary judgment on their quantum meruit claims.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion should be denied.

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RESPECTFULLY SUBMITTED this 14th day of January, 2013.

NORTHWEST JUSTICE PROJECT

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FARMWORKER JUSTICE

/s/ Weeun Wang
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CERTIFICATE OF SERVICE

I hereby certify that on January 14th, 2013, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system and caused it to be served by mail to the following:

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